IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 480 OF 2005

IN

SUIT NO. 3658 OF 2004

Laxman Abaji Surve ... Plaintiff.

Vs.

Fateh Rahimtullah Mitha

and Ors. ... Defendants.

Mr. P.R.Kadam with Mr. M.M.Vaidya for the Plaintiff.

Mohan Bir Singh for defendant No. 1 & 2.

Mr. H.J.Thakkar with Mr. M.N.Bhadrashetty i/b.

V.M.Joshi for the defendantNO.3.

CORAM : S.K.Shah, J.
DATE : April 8, 2004.

P.C.:-

1. Heard the learned Counsel on both sides.

2. This Notice of Motion is taken out by the Plaintiff seeking permanent injunction, restraining the defendants from entering into the Suit Petrol Pump and disturbing the peaceful possession of the Plaintiff over the Suit Petrol Pump.

3. It is undisputed that the defendant No. 1 and 2 who were the owners of the Petrol Pump and the lessees of the land on which the Petrol Pump stands. Subsequently, the defendant NO.1 and 2 have sold the Petrol Pump to M/s.Mindscan Trading Company Pvt. Ltd., who is not made party in this case. The defendant NO. 3 is the Co-operative Bank. M/s. R.R.Enterprises, who is not joined as defendant in this case, had taken loans from the defendant No.3 Bank by way of cash credit facility, amounting to Rs. 1.75 crores. The defendant NO. 1 and 2 have transferred the lease-hold rights in the Petrol Pump to M/s.F.M. Land Developers. The Petrol Pump, the Stock and Machinery on the Petrol Pump was hypothecated to the defendant NO.3 - Bank, under two agreements of Hypothecation, both dated 26th March, 2004, executed by the Proprietor of R.R. Enterprises. The Proprietor of R.R.Enterprises and the Director of M/s. Mindscan Trading Co. Pvt.Ltd. is one and the same person i.e. Mr. R.M.Mishra. Both these documents are dated 26th March, 2003.

4. The defendant NO.3 had issued Notice under Section 34 of the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 against the Plaintiff, Mr. R. M. Mishra, by deed of Partnership, dated 22nd December, 2002 became Partner of Chhagan Mitha and Company, who were the owners of the Petrol Pump. It is, after becoming the Partner of the Petrol Pump that the aforesaid documents of hypothecation of stock and hypothecation of machinery were made in favour of the defendant No. 3- Bank.

5. The Plaintiff has filed the Suit for getting a declaration that the Plaintiff is in exclusive use, occupation and possession of the Suit Petrol Pump namely M/s. Chhagan Mitha & Co., situated at 612, C.S. No. 332 (Old Scheme No. 111 Chembur) V.N. Purav Marg, Chembur, Mumbai 400 071, as owner thereof and for getting conveyance deed executed from the defendant NO.1 and 2 in his favour and other alternative reliefs.

6. This Suit is based on the Power of Attorney, dated 3.3.1997, Exhibit -’B" to the plaint, executed in favour of the Plaintiff by the defendant No. 1 and 2 and the agreement of Sale, dated 9th July, 2001, executed by the defendant NO. 1 and 2 in favour of the Plaintiff.

7. It will have to be seen whether the Plaintiff has any prima facie case in his favour to get the aforesaid relief of injunction.

. He is claiming the relief of injunction on the strength of the aforesaid two documents, namely, the Power of Attorney and the Agreement of Sale.

. Under the Power of Attorney, the defendant No. 1 and 2 gave to the Plaintiff, power in respect of the petrol outlet of the HPCL Petrol Pump, being run in the name and style of M/s. Chhagan Mitha and Company. Therefore, by virtue of the Power of Attorney, dated 3.3.97, the Plaintiff got the possession of the Petrol Pump, for being run in the same name and Style i.e. M/s. Chhagan Mitha and Company, as it still is and owned by the defendant NO. 1 and 2. Therefore, it is obvious that the Plaintiff got only the right to run the Petrol Pump and nothing more. The ownership, obviously, continued with the defendant NO. 1 and 2.

. The second document, on which the Plaintiff is placing reliance is the agreement of sale, dated 9th July, 2001. Under this agreement, the Plaintiff agreed to purchase the entire property i.e. land of Plot No. 612, C.S. No. 332, V.N. Purav Marg, Chembur, Mumbai

400 071, including the Petrol Pump for a total consideration of Rs. 50,00,000/- (Rupees fifty lacs only). The Receipt is attached to the agreement, which shows that the plaintiff had made payment of Rs. 5,00,000/- by cheque and Rs. 20,00,000/- in cash. It is, under this agreement of sale, the Plaintiff claims to have become owner not only of the land, but also of the Petrol Pump. Clause (2) of the agreement, mentions as under :-

> "2. Vendors shall, in respect of the full consideration of the agreement hereof, put the purchaser in vacant and peaceful possession of the said property, situated at Plot No. 612, C.S. No. 332, V.N. Purav Marg, Chembur, Mumbai - 400 071."

This makes it clear that the possession of the land is not given to the Plaintiff and that was agreed to be given to the Plaintiff by defendant NO. 1 and 2, only on getting full consideration i.e. Rs. 50,00,000/-. It is nobodys case that the entire consideration has been paid by the Plaintiff to the defendant No.1 and 2. This document, therefore, does not help the Plaintiff in prima facie showing that he is in possession of the Petrol Pump as owner. Therefore, the document, on the

basis of which the Plaintiff claims to be in possession of the Petrol Pump, is the Power of Attorney, dated 3rd March, 1997. However, as stated above, under this document, the owners of the Petrol Pump, had given the Petrol Pump to the Plaintiff, only for the purpose of running it and nothing more. It means that the plaintiff was only the agent of the defendant No. 1 and 2.

8. There is another document produced by the Plaintiff, which is styled as ’Deed of Surrender’, dated 6th June, 2003. Whereunder, the Plaintiff surrendered his right to purchaser of the land of plot No. 612, which he had agreed to purchase under the agreement, dated 9th July, 2001, including the Petrol Pump.

. The learned Counsel for the Plaintiff, however, submits that he has challenged this deed of surrender, however, so long as it is not set aside by any Order of the Court, that stands. By Deed of Surrender, therefore, the Plaintiff surrendered all his rights which he got under the agreement, dated 9th July, 2001. Under this Surrender Deed, he received consideration of Rs. 5,00,000/-. In clause (3) of the Surrender Deed, it is clearly mentioned that " he admits and acknowledges the receipt of Rs. 5,00,000/- being equal

of the consideration for surrendering his rights".

9. Under these circumstances, even the conducting rights of the Petrol Pump were also surrendered under the said Deed of surrender. At any rate, whatever the right, the plaintiff got under the Power of Attorney, dated 3.3.1997, was only to run the Petrol Pump and nothing more. He does not have anything to show that he became the owner of the Petrol Pump. Moreover, whatever the conducting rights he had, he had surrendered them under the Deed of Surrender, dated 6th June, 2003.

10. As against this, the learned Counsel for the Defendant No. 3- Bank has relied on the hypothecation documents, where under the stock at the petrol pump and the machinery on the petrol Pump were hypothecated with the Bank by the person having ownership over the same.

11. Thus, the Plaintiff failed to make out any prima facie case to get the relief of injunction against the defendant No.3.

12. Even considering the balance of convenience, under the aforesaid circumstances, no such equitable relief should be granted in favour of the Plaintiff. This is so because there is outstanding liability of Rs. 1.75 crores, and interest, payable by the borrower,

namely, Ram Manohar Mishra and his Firms and Compaies. Section 34 of the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - provides that the Civil Court has no jurisdiction in respect of the actions taken by the Co-operative Banks against its borrowers.

13. Under these circumstanceds, the Plaintiff is not entitled to get any relief as prayed.

14. The Notice of Motion stands dismissed.

. The ad interim reliefs granted earlier shall stand vacated.

15. The learned Counsel for the Plaintiff seeks Stay of this Order for a period of one week. The learned Counsel for the Defendant No. 3 strongly objects to the same, stating that ad interim relief was granted ex parte without hearing him. In any case, ad interim injunction is in favour of the Plaintiff and granting seven more days would not make much difference. So the request made on behalf of the Plaintiff is accepted.

16. The defendant No.3 shall not act upon and/or take any action for a period of one week, so far as the Petrol Pump, Stock and Machineary is concerned.

17. Certified Copy expedited.

18. Parties to act on ordinary copy of this Order duly authenticated by the Associate of this Court.

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[S.K.Shah, J.]